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10/783,540	02/20/2004	John T. Pienkos		7442

7590
JOHN T. PIENKOS
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EXAMINER

WEINSTEIN, STEVEN L.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN T. PIENKOS

Appeal 2009-012330
Application 10/783,540
Technology Center 1700

Before TERRY J. OWENS, PETER F. KRATZ, and MARK NAGUMO,
Administrative Patent Judges.

NAGUMO, *Administrative Patent Judge.*

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

A. Introduction²

John T. Pienkos (“Pienkos”) timely appeals under 35 U.S.C. § 134(a) from the final rejection³ of claims 1-3, 5-11, 13, and 21-23. We have jurisdiction under 35 U.S.C. § 6. We REVERSE.

The subject matter on appeal relates to an edible pocket formed from dough having a “protrusion” by which the item can be held.

Representative Claim 1 reads:

1. An apparatus that is at least partly consumable comprising:
 - a pocket formed from dough,
 - wherein the pocket has a length dimension, a width dimension and a depth dimension, and
 - wherein each of the width dimension and the length dimension is substantially greater in extent than the depth dimension;
 - a portion of a food stuffing material captured within the pocket; and
 - a protrusion coupled to the pocket along at least most of a 90 degree segment around a perimeter that extends around the pocket and substantially encompasses the length dimension and the width dimension,
 - wherein the protrusion is capable of being grasped and, when so grasped, the pocket is capable of being supported by the protrusion.

(Claims App., Br. 17; indentation and paragraphing added.)

² Application 10/783,540, *Stuffed Dough Pocket with Grasping Extension*, filed 20 February 2004. The specification is referred to as the “540 Specification,” and is cited as “Spec.” The real party in interest is listed as John T. Pienkos, the listed inventor. (Appeal Brief, filed 30 October 2008 (“Br.”), 3.)

³ Office action mailed 28 April 2008 (“Final Rejection”; cited as “FR”).

The Examiner has maintained the following ground of rejection:⁴

Claims 1-3, 5-11, 13, and 21-23 stand rejected⁵ under 35 U.S.C. § 103(a) in view of the combined teachings of Kienle,⁶ {Woods,⁷ Potter,⁸ Hsieh,⁹ Kojima,¹⁰ Gordon 498,¹¹ Gordon 780,¹² Gordon 542,¹³ Gordon 541,¹⁴ Seyfert,¹⁵ Gansle,¹⁶ Hreschak,¹⁷ Teras,¹⁸ Maric,¹⁹ Odom,²⁰ Burt,²¹ Kaufman,²²} and applicant's admission of the prior art.²³

⁴ Examiner's Answer mailed 23 January 2009 ("Ans."). The curly braces indicate art said by the Examiner to be cumulative. (Ans. 5, l. 19-6, l. 4.)

⁵ The Examiner's statement of rejection erroneously includes canceled claims 14-16 and 24-26. (Ans. 4.)

⁶ Christoph Kienle, *Pastry*, DE 4,120,385 (1991).

⁷ Raymond Woods and Deborah Martel, U.S. Patent 6,423,357 B1 (2002).

⁸ Archibald L. Potter, Jr., et al., U.S. Patent 3,384,495 (1968).

⁹ Yen Chin Hsieh, U.S. Patent Application Publication US 2004/0018276 A1 (29 January 2004) based on an application filed 4 June 2003.

¹⁰ Kimberly Kojima, U.S. Patent Des 405,936 (1999).

¹¹ James Gordon, U.S. Patent Des 195,498 (1963).

¹² James Gordon, U.S. Patent Des 194,780 (1963).

¹³ James Gordon, U.S. Patent Des 193,542 (1962).

¹⁴ James Gordon, U.S. Patent Des 193,541 (1962).

¹⁵ John C. Seyfert, U.S. Patent Des 309,210 (1990).

¹⁶ Christian Gansle, U.S. Patent Des 67,885 (1925).

¹⁷ Bohdan O. Hreschak, U.S. Patent Des 212,070 (1968).

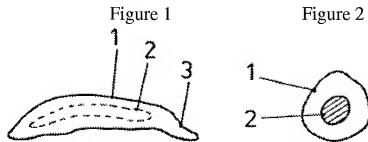
¹⁸ Lee Michael Teras, et al., U.S. Patent Application Publication US 2002/0132029 A1 (2002).

¹⁹ Rafael Maric, U.S. Patent Application Publication US 2006/0040020 A1 (23 February 2006), based on an International Application filed 13 February 2002.

B. Discussion

Findings of fact throughout this Opinion are supported by a preponderance of the evidence of record.

The Examiner finds that Kienle describes the food product depicted in Figures 1 and 2, reproduced below;



{ Kienle Figure 1 is said to show a top view of a meat-filled pastry }
{ Kienle Figure 2 is said to show a radial cross-section of the pastry }

Figure 1 is said to show a top view of a pastry 1,²⁴ which has a pocket filled with meat 2 and a tip 3 by which the pastry can be held. The Examiner appears to find that the Kienle pastry does not meet the relative length, width and depth limitations because the Examiner relies on Pienkos's "admissions" in the 540 Specification at page 1, paragraphs [0002] and [0003], and at

²⁰ William J. Odom, Jr., Odom, U.S. Patent Application Publication US 2004/0011223 (22 January 2004), based on an application filed 22 July 2002.

²¹ Harry B. Burt, U.S. Patent 1,718,997 (1922).

²² Mico H. Kaufman, U.S. Patent 3,331,626 (1967).

²³ Identified by the Examiner as page 1, paras. 2 and 3, and page 3, para. 8 of the 540 Specification. (Ans. 5, ll. 4-5.)

²⁴ For clarity, labels of elements in drawings are presented in bold font throughout this Opinion, regardless of their presentation in the original document.

page 3, [0008] that such dimensional relations are known in the art, as evidence supporting the conclusion that it would have been obvious to modify the shape of the Kienle pastry. (Ans. 5.) Similarly, the Examiner finds that Kienle does not disclose the required dimensions and placement of the protrusion relative to the pocket required by claim 1. (Ans. 6.) To make up for these deficiencies, the Examiner cites the remaining references as “evidence that it was notoriously conventional to provide edibles with either integral or attachable, edible handles in the form of all types of projecting members.” (*Id.*, citing in the Examiner’s Answer but not in the Final Rejection, particular figures (in the case of Teras, a paragraph in the disclosure describing a prior art handle).) The Examiner concludes that “the particular dimension and extent of the handle, vis-à-vis the rest of the product, would have either been an obvious result effective variable, routinely and obviously determinable, or an obvious matter of choice and/or design.” (*Id.*)

A showing of obviousness requires a demonstration that the “differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious” 35 U.S.C. § 103(a). Even if we accept, *arguendo*, that it would have been obvious to substantially flatten the generally cylindrical pastry shown by Kienle, it is not clear how the thin vertically oriented edible handle 50 for mug 20 shown by Woods in Figure 3, or the cylindrical handle 2 shown by Potter attached to flat blade 1 in Figure 1, or any of the other handles shown by the remaining references would have suggested a protrusion “substantially encompassing the length dimension and the width dimension”

as required by appealed claim 1. The remaining handles are similar, and the Examiner has not explained why they would have suggested the modifications required to meet the claimed structure. Even the handle shown in Gordon 498—the only handle specifically identified by the Examiner (Ans. 9)—although arguably meeting the “90 degree segment” limitation (taking the center of the spoon bowl as the origin), does not “substantially encompass the length dimension and the width dimension.” (Br. 10.)

The multitude of cumulative references cited by the Examiner for the same point make clear that the Examiner considers the claimed invention to be unpatentable. The difficulty, however, is that the evidence has not been shown, in the words of the Federal Rules of Evidence, to have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. Put concretely, that many varieties of edible handles for edible spoons and cups are known does not show that the class of protrusions (which are not even required to be edible) recited in claim 1 would have been obvious. In summary, the Examiner has not directed our attention to evidence in the record on appeal directly relevant to the limitation, “a protrusion coupled to the pocket” that “substantially encompasses the length dimension and the width dimension [of the pocket].” The rejections of the dependent claims do not cure the deficiencies in the rejection of claim 1.

C. Order

We REVERSE the rejection of claims 1-3, 5-11, 13, and 21-23 under 35 U.S.C. § 103(a) over the art applied by the Examiner.

REVERSED

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